Doe v. Commonwealth's Attorney for the City of Richmond (1975)

403 F. Supp 1199

Two adult males, in a suit brought before a three-judge federal district court, challenged the constitutionality and sought to enjoin the enforcement of Virginia's sodomy statute as it was applied to punish consensual homosexual relations in private. The plaintiffs argued, inter alia, that the statute abridged their rights to privacy. By a two-to-one vote, the district court denied the plaintiffs the relief they sought. This decision, of which excerpts are presented here, subsequently was appealed to the United States Supreme Court, which affirmed the district court judgment without opinion. Justices Brennan, Marshall, and Stevens dissented, arguing that probable jurisdiction should be noted and that the case should be set for oral argument.

SENIOR CIRCUIT JUDGE BRYAN.

. . . Our decision is that on its face and in the circumstances here … [the statute] is not unconstitutional. No judgment is made upon the wisdom or policy of the statute. It is simply that we r say that the statute offends the Bill of Rights or any other of the Amendments and the wisdom or policy is a matter for the State's resolve.

Precedents cited to us as *contra* rest exclusively on the precept that the Constitution condemns State legislation that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life. This and only this concern has been the justification for nullification of State regulation in this area. Review of plaintiffs' authorities will reveal these as the principles underlying the referenced decisions.

In *Griswold v. Connecticut*, [1965] . . . plaintiffs' chief reliance, the Court has most recently announced its views on the question here. Striking down a State statute forbidding the use of contraceptives, the ruling was put on the right of marital privacy—held to be one of the specific guarantees of the Bill of Rights—and was also put on the sanctity of the home and family. Its thesis is epitomized by the author of the opinion, Mr. Justice Douglas, in his conclusion:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." . . .

That *Griswold* is premised on the right of privacy and that homosexual intimacy is denunciable by the State is unequivocally demonstrated by Mr. Justice Goldberg in his concurrence, . . . in his adoption of Mr. Justice Harlan's dissenting statement in *Poe v. Ullman* (1961):

> "Adultery, *homosexuality* and the like are sexual intimacies *which the State forbids* . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. *It is one thing when the State exerts its power either to forbid extramarital sexuality* … or to say who may marry, but it is quite another when, having

> acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. " (Emphasis added.)

. . . Justice Harlan's words are nonetheless commanding merely because they were written in dissent. To begin with, as heretofore observed, they were authentically approved in *Griswold*. Moreover, he was not differing with the majority there on the merits of the substantive case but only as to the procedural reason of its dismissal. At all events, the Justice's exegesis is that of a jurist of widely acknowledged superior stature and weighty whatever its context. . . .

. . . With no authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life—the next question is whether there is any ground for barring Virginia from branding it as criminal. If a State determines that punishment therefor, even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so. . . . In short, it is an inquiry addressable only to the State's Legislature.

Furthermore, if the State has the burden of proving that it has a legitimate interest in the subject of the statute or that the statute is rationally supportable, Virginia has completely fulfilled this obligation. Fundamentally the State action is simply directed to the suppression of crime, whether committed in public or in private. Both instances . . . are within the reach of the police power.

Moreover, to sustain its action, the State is not required to show that moral delinquency actually results from homosexuality. It is enough for upholding the legislation to establish that the conduct is likely to end in a contribution to moral delinquency. Plainly, it would indeed be impracticable to prove the actuality of such a consequence, and the law is not so exacting. . . .

Although a questionable law is not removed from question by the lapse of any prescriptive period, the longevity of the Virginia statute does testify to the State's interest and its legitimacy. It is not an upstart notion; it has ancestry going back to Judaic and Christian law.

In sum, we believe that the sodomy statute, so long in force in Virginia, has a rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court. . . .

The prayers for a declaratory judgment and an injunction invalidating the sodomy statute will be denied.

DISTRICT JUDGE MERHIGE, dissenting.

. . . In my view, in the absence of any legitimate interest or rational basis to support the statute's application we must, without regard to our own proclivities and reluctance to judicially bar the state proscription of homosexuality, hold the statute as it applies to the plaintiffs to be violative of their rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court decision in *Griswold v. Connecticut* . . . , as the majority points out, premised on the right of privacy, but I fear my brothers have misapplied its precedential value through an apparent over-adherence to its factual circumstances.

The Supreme Court has consistently held that the Due Process Clause of the Fourteenth Amendment protects the right of individuals to make personal choices, unfettered by arbitrary and purposeless restraints, in the private matters of marriage and procreation. *Roe v. Wade*

(1973) . . . ; *Doe v. Bolton* (1973) . . . . I view those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.

To say, as the majority does, that the right of privacy, which every citizen has, is limited to matters of marital, home or family life is unwarranted under the law. Such a contention places a distinction in marital-nonmarital matters which is inconsistent with current Supreme Court opinions and is unsupportable. . . .

. . . In my view, *Griswold* applied the right of privacy to its particular factual situation. That the right of privacy is not limited to the facts of *Griswold* is demonstrated by later Supreme Court decisions. After *Griswold*, by virtue of *Eisenstadt v. Baird* (1972), the legal viability of a marital-nonmarital distinction in private sexual acts if not eliminated, was at the very least seriously impaired.

In significantly diminishing the importance of the marital-nonmarital distinction, the Court to a great extent vitiated any implication that the state can, as suggested by Mr. Justice Harlan in *Poe v. Ullman*, . . . forbid extra-marital sexuality and such implications are no longer fully accurate. . . .

Griswold . . . in its context, applied the right of privacy in sexual matters to the marital relationship. *Eisenstadt*, . . . however, clearly demonstrates that the right to privacy in sexual relationships is not limited to the marital relationship. Both *Roe* . . . and *Eisenstadt* . . . cogently demonstrate that intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.

This approach does not unqualifiedly sanction personal whim. If the activity in question involves more than one participant, as in the instant case, each must be capable of consenting, and each must in fact consent to the conduct for the right of privacy to attach. For example, if one of the participants in homosexual contact is a minor, or force is used to coerce one of the participants to yield, the right will not attach. Similarly, the right of privacy cannot be extended to protect conduct that takes place in publicly frequented areas. . . . However, if the right of privacy does apply to specific courses of conduct, legitimate state restriction on personal autonomy may be justified only under the compelling state interest test. See *Roe v. Wade*. . . . Plaintiffs are adults seeking protection from the effects of the statute under attack in order to engage in homosexual relations in private. Viewing the issue as we are bound to, as Mr. Justice Blackmun stated in *Roe v. Wade*, . . . "by constitutional measurement, free of emotion and predilection," it is my view that they are entitled to be protected in their right to privacy by the Due Process Clause. . . .

On the basis of this record one can only conclude that the sole basis of the proscription of homosexuality was what the majority refers to as the promotion of morality and decency. As salutary a legislative goal as this may be, 1 can find no authority for intrusion by the state into the private dwelling of a citizen. *Stanley v. Georgia* (1969) teaches us that socially condemned activity, excepting that of demonstrable external effect, is and was intended by the Constitution

to be beyond the scope of state regulation when conducted within the privacy of the home. . . . Whether the guarantee of personal privacy springs from the First, Fourth, Fifth, Ninth, the penumbra of the Bill of Rights, or, as I believe, in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, the Supreme Court has made it clear that fundamental rights of such an intimate facet of an individual's life as sex, absent circumstances warranting intrusion by the state, are to be respected. My brothers, I respectfully suggest, have by today's ruling misinterpreted the issue— the issue centers not around morality or decency, but the constitutional right of privacy.

I respectfully note my dissent.